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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 712

MARTIN MALINOU,
PUBLIC ADMINISTRATOR,
Petitioner,

v.

GORDON CAIRNS,
RHODE ISLAND HOSPITAL TRUST
COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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INDEX

PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTE INVOLVED 4
STATEMENT 7
REASONS FOR GRANTING THE WRIT 15
CONCLUSION 23
APPENDIX A - Opinion of the Rhode Island Supreme Court A-1
APPENDIX B - Opinion of the Rhode Island Superior Court B-1

CITATIONS

CASES:

Attorney General v. City of Providence, 8 R.I. 8 19
Baker v. Carr, 369 U.S. 186 20
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 ..... 17, 18
Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co., 243 U.S. 157 17
Malinou v. Cairns, 94 R.I. 279 22
N.A.A.C.P. v. Alabama, 357 U.S. 449 20
Saunders v. Shaw, 244 U.S. 317 18
The Trustees of Dartmouth College v. Woodward, 17 U.S. 518 16

STATUTES:

Public Administrator Act, Sec. 1 7
Public Administrator Act, Sec. 2 ..... 16, 17
Public Administrator Act, Sec. 8 19
Public Administrator Act, Sec. 10 19
Public Administrator Act, Sec. 11 ..... 20, 21

2 R. I. Gen. L. (1956) 9-24-11. 17
6 R. I. Gen. L. (1956) 33-21-8 19
7 R. I. Gen. L. (1956) 45-5-10. 8
R.I. Public Laws (1961) Ch. 195, Sec. 2 19

ORDINANCES:

Providence Rev. Ord. (1946) Ch. 2, Sec. 157 8
Providence Rev. Ord. (1946) Ch. 2, Sec. 159 8

RHODE ISLAND GENERAL ASSEMBLY BILLS:

H-910 Jan. Sess. (1950). 21

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Rhode Island rendered on July 12, 1967, in case number A-106, styled *Martin Malinou, Public Administrator v. Gordon Cairns, Rhode Island Hospital Trust Company, et al.*, wherein the Rhode Island Supreme Court affirmed the judgment of the Rhode Island Superior Court and denied and dismissed the Petitioner's appeal.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court (R. 18) is not yet officially reported; it is unofficially reported in 231 A.2d 785; and it is printed in Appendix A hereto. The memorandum opinion of the Rhode Island Supreme Court (R. 3), denying the Petitioner's motion for reargument is not yet officially reported; it is unofficially reported in 231 A.2d 785, 788. The memorandum opinion of the Rhode Island Supreme Court (R. 2), granting the Petitioner's motion for a stay of the execution of the judgment sought to be reviewed, is not reported. The opinion of the Rhode Island Superior Court (R. 223, pp. 205-207) is not reported; it is printed in Appendix B hereto. The Probate Court of the City of Providence did not deliver an opinion.

JURISDICTION

The Rhode Island Supreme Court judgment sought to be reviewed (R. 18, 23; Appx. A-5) was rendered on July 12, 1967 (R. 24). The Petitioner's timely motion for leave to file a petition for reargument (R. 8) was denied on August 1, 1967 (R. 3). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since the Petitioner specially claims a substantive right of property under the Fourteenth Amendment of the Constitution of the United States and also specially claims a right to procedural due process under the Fourteenth Amendment of the Constitution of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since the Petitioner, on behalf of the people of the City of Providence, Rhode Island, specially claims a right to procedural due process under the Fourteenth Amendment of the Constitution of the United States.

QUESTIONS PRESENTED

The following language in the opinion delivered upon the rendering of the judgment sought to be reviewed provides background for the first question presented:

"Here the record is clear and undisputed that at the time appellant appeared in the probate court, appellee Cairns' petition for the appointment of the Hospital Trust as administrator was then and there pending. This fact in and of itself, in our opinion, effectively prevents appellant from exercising the duties of his office." (R. 21; Appx. A, p. 3).

QUESTION I

In the course of construing the 1950 amendment to Section 2 of the Public Administrator Act, R. I. Acts, 1876, ch. 567, as amended by R. I. Acts, 1950, ch. 2596, did the Rhode Island Supreme Court's interpretation of the phrase "no administration having been granted or proceedings therefor pending" to denote the Administration petition which contained the Respondent Cairns' allegation that he was a "remote cousin" of the Decedent deprive the Petitioner of his right of "property" to administer the Beazley Estate "without due process of law" within the meaning of U.S. Const. Amend. XIV, Sec. 1?

If the Rhode Island Supreme Court held correctly or as an independent state matter that the phrase "no administration having been granted or proceedings therefor pending" denotes the administration petition which contained the Respondent Cairns' allegation that he was a "remote cousin" of the decedent, then there is presented the second question, for which the following language in the opinion delivered upon the rendering of the judgment sought to be reviewed provides background: "In view of the pendency of the petition for administration at the time of the appellant's entry of appearance, we are compelled for the reasons stated herein to dismiss the instant appeal. Accordingly there is no need to consider the several other contentions set forth in the appellant's brief." (R. 23; Appx. A, p. 5).

QUESTION II

Did the Rhode Island Supreme Court deprive the Petitioner of his right to administer the Beazley estate, in violation of the procedural due process requirements of U.S. Const. Amend. XIV, Sec. 1, by refusing to consider and determine the merits of the Petitioner's Appeal from the Rhode Island Superior Court's Judgment which, inter alia, found the Respondent Cairns to be next of kin of the Decedent?

QUESTION III

Did the Rhode Island Supreme Court deprive the people of Providence of the free use of the Beazley estate assets, in violation of the procedural due process requirements of U.S. Const. Amend. XIV, Sec. 1, by refusing to consider and determine the merits of the Petitioner's Appeal from the Rhode Island Superior Court's Judgment which, inter alia, found the Respondent Cairns to be next of kin of the Decedent?

STATUTE INVOLVED

The case involves "*an Act providing for the appointment of a Public Administrator in the City of Providence*" (hereinafter Public Administrator Act), R. I. Acts, 1876, Ch. 567, as amended by R. I. Acts, 1950, Ch. 2596:

> "Section 1. The city council of the city of Providence may appoint some suitable person, being an inhabitant of said city, to be public administrator therein; and the person so appointed shall hold his office during the pleasure of the city council.
>
> Section 2. Such administrator shall take out letters of administration and faithfully administer upon the estate of any person who dies intestate within the City of Providence or elsewhere, leaving property in the said city to be administered *and no administration having been granted or proceedings therefor pending*, such person at the time of his decease not

being an inhabitant or resident of any other town or city in this State, and not leaving a known husband, widow or next of kin *within this State*, which fact shall be established by proof satisfactory to the Probate Court of the City of Providence.

Section 3. Administration shall not be granted to a public administrator within thirty days next after the decease of such intestate.

Section 4. After granting letters of administration to a public administrator, and before the final settlement of the estate, if the husband, widow or any next of kin of the deceased, in writing claims the right of administration, or requests the appointment of some other suitable person to the trust, the municipal court in the city of Providence shall grant letters of administration accordingly. Upon the appointment of a successor, and his giving the bond required, the powers of the public administrator over the estate shall cease.

Section 5. Such public administrator shall deliver into the municipal court his letters of administration upon the estate of any person deceased, if a will of such person is thereafter allowed and proved. Upon the appointment of an executor or administrator as his successor in any case, he shall surrender his letters of administration into the municipal court with an account upon oath of his doings thereon; and upon the allowance of his account by the municipal court, shall pay over and deliver to his successor all sums of money in his hands, and all property, effects and credits of the deceased not administered.

Section 6. Such public administrator shall give bond to the municipal court for the faithful performance of his duties, in like manner as required of other administrators, with the further conditions to comply with the provisions of the preceding section.

Section 7. Such public administrator may be licensed to sell real estate for the payment of debts, and

shall administer estates and render his account, in the same manner as other administrators, except as herein otherwise provided.

Section 8. When an estate has been fully administered by such public administrator, and the debts paid according to law, he shall deposit the balance of such estate remaining in his hands with the treasurer of the city of Providence, who shall receive and hold it for the benefit of those who may have lawful claims thereon.

Section 9. Such public administrator shall render an account of his proceedings to the municipal court of said city, at least once in each year, until the trust has been fulfilled. And when, upon a final settlement of any estate, it appears that moneys remain in the hands of such administrator, which by law should have been deposited with the city treasurer, the municipal court shall certify that fact and the statement of the amount to said treasurer, who, unless such deposit is made within thirty days after the receipt of such notice, shall cause the bond of the administrator to be prosecuted for the recovery thereof.

Section 10. All money or other property received by the city treasurer of the city of Providence, under the provisions of this act, shall be held for the same uses, as provided by chapter 177 of the General Statutes.

Section 11. Upon the death, resignation or other disqualification of a public administrator leaving an estate or estates not fully administered, it shall be the duty of the municipal court, upon application of the city treasurer, to appoint some suitable person to have the charge and care of the personal estate not administered, to hold the same until a successor to such deceased, resigned or disqualified public administrator shall be duly appointed, to whom the municipal court shall grant letters of administration de bonis non upon his giving the required bond.

Section 12. Upon the death, resignation or other disqualification of a public administrator, the city council shall fill the vacancy forthwith.

Section 13. When a public administrator neglects to return an inventory, settle an account, or perform any other duty incumbent upon him, (and there appears no heir entitled thereto), the city treasurer shall, in behalf of the said city of Providence, prosecute all suits and do all acts necessary and proper to ensure a prompt and faithful administration of the estate, and the payment of the proceeds thereof into the treasury."

Section 2, as amended, may be found in the Rhode Island Acts and Resolves of 1950 at pages 661-662. Sections 1, and 3 through 13 may be found in the Rhode Island Acts and Resolves of 1876, May Session, at pages 2-4, together with the original text of Section 2. (Italics have been supplied to show the phraseology added by the 1950 Amendment.)

STATEMENT

Ernest V. Beazley (decedent), late of Providence, Rhode Island, died on February 1, 1961. (R. 211, Ex. 11). He had never married. (R. 211, Ex. 11). He left no known next of kin him surviving in the State of Rhode Island. (R. 223, p. 157). He died intestate. (R. 223, pp. 126-127). His estate is the subject matter of this case. The right to administer is contested by the parties.

The Respondents are Gordon Cairns of East Clifton, Quebec, Canada, and the Rhode Island Hospital Trust Company (Hospital Trust), a Rhode Island banking corporation. The Petitioner is Martin Malinou of Providence, Rhode Island, who held the office of Public Administrator in and for Providence on the date of the decedent's death.[1] (R. 223, p. 133).

[1] The Public Administrator Act, Sec. 1 delegated the power to appoint a public administrator to the City Council of the City of Providence, Rhode Island (city council). The city council elected the Petitioner to be Public Administrator on January 2, 1961. The title to

On April 25, 1961, the Respondent Gordon Cairns caused to be filed in the Probate Court of the City of Providence, Rhode Island, a petition for the appointment of the Respondent Hospital Trust as administrator of the estate of Ernest V. Beazley (Beazley Estate). (R. 223, p. 124). In

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the office of Public Administrator has been in dispute since January 7, 1963, when the city council elected Leonard A. Kiernan to be Public Administrator. On January 4, 1965, the city council elected Francis J. Maguire to be Public Administrator. On January 2, 1967, the city council re-elected Francis J. Maguire. The Rhode Island Supreme Court may reach the question of who now holds the title in an action certified to it by the Rhode Island Superior Court, Perkins, J., and scheduled to be argued on October 3, 1967. The case, *Malinou v. Kiernan*, is docketed in the Rhode Island Supreme Court No. 44A. *(See Reasons for Granting the Writ, infra,* p. 21).

A city ordinance provides for the biennial election of a public administrator:

> "The city council shall elect on the first Monday in January biennially, commencing A.D. 1913, the following officers, namely: One or more viewers of fences; a pound keeper at the Dexter Asylum, and a pound keeper at Roger Williams Park; three or more port wardens; one or more packers of fish; *a public administrator*; an inspector of saleratus, bicarbonate of soda and cream of tartar; an inspector of chain cables; an inspector of beef and pork; a sealer of leather; one or more inspectors of hoops; one or more surveyors and corders of wood; one or more surveyors and measurers of stone; one or more inspectors and measurers of carpenters', masons' and painters' work; two or more measurers of grain, meal, salt and sea-coal; one or more weighers of cotton; one or more appraisers of damage under the dog law; one or more auctioneers; a fire marshal; a superintendent of the burial of deceased soldiers and sailors; six or more cattle weighers; one or more weighers of coal and other articles of merchandise." Providence Rev. Ord. (1946) Ch. 2, Sec. 157. (Italics supplied)

The Rhode Island General Assembly delegated to the city council the authority to establish a fee to be paid by the appointee to the office of public administrator. 7 R.I. Gen. L. (1956) 45-5-10. The city council established a fee of ten dollars to be paid by the appointee to the office of public administrator. Providence Rev. Ord. (1946) Ch. 2, Sec. 159.

his petition the Respondent Cairns claimed to be a "remote cousin" of the decedent. (R. 200). The Petitioner entered a written appearance in the probate court proceeding on May 16, 1961. (R. 180).

The court of first instance in this case was the Probate Court of the City of Providence (probate court) which is not a court of record. On May 26, 1961, the probate court entered a decree whereby it appointed the Respondent Hospital Trust administrator of the Beazley Estate. (R. 200). The Petitioner appealed from the probate court decree to the Rhode Island Superior Court.

A trial was held in Superior Court on March 2, 3, 4, and 8 of 1966, before a justice of the Superior Court and a jury. On March 10, 1966, the Superior Court entered a final judgment whereby it (1) found Respondent Gordon Cairns to be one of the next of kin of the decedent, (2) affirmed the May 26, 1961, probate court decree appointing Hospital Trust administrator of the Beazley Estate, (3) approved the petition of the Respondent Gordon Cairns for appointment of the Hospital Trust as administrator of the Beazley Estate, and (4) denied and dismissed the Petitioner's appeal from the May 26, 1961 probate court decree. (R. 39-40). The Superior Court judgment reads in part (R. 39): "The Court finds based upon the evidence presented (and considering the opinion of the jury) that Gordon Cairns is one of the next of kin of the deceased, Ernest V. Beazley." The Petitioner appealed from the Superior Court judgment to the Rhode Island Supreme Court.

On July 12, 1967, the Rhode Island Supreme Court rendered judgment in the last sentence of the opinion delivered therewith, as follows (R. 23; Appx. A, p. 5): "The appellant's appeal is denied and dismissed and the judgment appealed from is affirmed."

How the Federal Questions Are Presented

The Petitioner objected to the entry of the final judgment by the Superior Court. (R. 223, p. 205). At the time of the entry of the final judgment by the Superior Court and the Petitioner's objection thereto the Petitioner first sought to raise *Question I* concerning his claimed property right to administer the Beazley Estate. (R. 223, pp. 200-203):

> "MR. MALINOU: . . . As a matter of law, this court must determine the meaning of that part of Section 2 of the Public Administrator Act which says 'no administration having been granted or proceeding therefor pending . . .' My brother says that because the petition of his client, Gordon Cairns, was on file and no written petition was on file prior to that time by the appellant, that this bars the appellant's rights. Clearly, then, the court must interpret the meaning of 'no administration having been granted or proceeding therefor pending,' which came to be part of the Public Administrator Act in 1950, by the Public Laws of that year, Chapter 2596, and I argue to this court that a proper interpretation of that provision of the amendment is that it controls the rights between two public administrators contesting for the right to administer, so that if administration on an estate within the purview of this Act has been granted to a public administrator, whose term of office later terminates, then his successor has no right to succeed the public administrator who has been appointed. It also means that if an incumbent public administrator has filed a written petition for an administration on an estate within the purview of the Act and while it is pending – "

The trial court would not allow the Petitioner to continue and prevented him from articulating the federal issue designated *Question I*:

> "THE COURT: Again I'm going to interrupt you. You're getting off the subject. I've got a trial going, I might say, but you're getting off the subject,

because I defined the terms of that statute in my charge to the jury, and that became the law of the case; right law, wrong law, it is the law of the case. All we're trying to determine this morning is what further step must I, as the presiding judge at this trial, which was tried through a jury in accordance with 33-23-10 of our statute, which says 'If a matter of fact be in controversy, either party may at any time before the assignment date claim a jury trial.' That was done here. So I am concerned with that, and I am also concerned with Section 18 of the same title and chapter which is entitled 'Affirmance, reversal, or entry of new decree.' I think you're getting away from that. Let's get to the matter at hand, or I will render my decision without listening to anything else.

MR. MALINOU: All right. I understand my argument has been limited; if I may just register my objection to it.

THE COURT: I'm not trying to limit you to what you can say, so long as we're talking about the matter that is before the court and nothing else. You've gotten away from it a little bit.

MR. MALINOU: I thought I was talking about a matter that was relevant.

THE COURT: I disagree. Much of what you have been saying would be on matters on motion for a new trial, and certainly what you've been arguing about my interpreting of Section 2 I've already done in my charge to the jury, and that's the law of the case. All right."

The Petitioner again sought to raise the federal issue designated *Question I* by setting forth his right claimed under the Fourteenth Amendment in a *Motion To Alter Judgment* filed in the Superior Court on March 15, 1966. (R. 33, 38). The *Motion To Alter Judgment* reads in part as follows (R. 33):

"The Appellant moves that the judgment entered on March 10, 1966, whereby the decree of the Probate Court of the City of Providence entered on May 26, 1961, appointing the Rhode Island Hospital Trust Company administrator of the Estate of Ernest V. Beazley was affirmed, and whereby the Appellant's appeal was denied and dismissed, be altered and that the Appellant be appointed administrator of the Estate of Ernest V. Beazley, by reason of the undisputed facts that the late Ernest V. Beazley died intestate, leaving no known widow nor next of kin him surviving within this state, and that no public administrator other than the appellant had ever been granted the administration of the Estate of Ernest V. Beazley nor had any public administrator other than the Appellant sought to take out letters of administration thereon, and for the further reason that the judgment deprives the Appellant of his right of 'property' within the meaning of U.S. Const. Amend. XIV, Sec. 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . ' and as such property right vested in him on the date of the decedent's death (2/1/61) by virtue of the Public Administrator Act, Sec. 2: . . ."

On July 7, 1966, the Superior Court refused to allow the Petitioner to argue his *Motion To Alter Judgment* and refused to pass thereon. (R. 223, pp. 209-216, 235). The Superior Court declared (R. 223, pp. 213-216):

"THE COURT: . . . the motion to alter judgment can be filed only in those cases tried without a jury. This was definitely a jury trial – we had twelve people sitting here, at least–and they came in with a verdict, so I assume it was a jury trial, and under those circumstances 59e is not applicable, . . .

* * *

MR. MALINOU: Well, am I prohibited from arguing the motion to alter?

THE COURT: Yes. . . .

* * *

MR. MALINOU: I wouldn't wish to stand here and argue a point on which the court has already ruled against me, Judge, but I simply wanted to clear the matter up in my own mind, because in view of the ruling as I understand it now, I cannot argue the constitutional issue presented in this court, I would have to raise it for the first time in the Supreme Court . . .

THE COURT: That is my ruling."

The Petitioner raised the issue designated *Question I* in his brief filed in the Rhode Island Supreme Court on December 9, 1966. (R. 212). *Point XIX* of the brief reads in part (R. 212, p. 42):

> "In the course of construing the Public Administrator Act the Superior Court deprived the Appellant of his right of 'property' to administer the Beazley Estate 'without due process of law' within the meaning of U.S. Const. Amend. XIV, Sec. 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .'
>
> "In the course of construing section 2 of the Public Administrator Act (full quote supra p. 23) the court applied the phrase 'no administration having been granted or proceedings therefor pending' to the instant contest between Gordon Cairns and the Appellant when in law the phrase has no application except as between public administrators. (See *Point I*) . . ."

Point I of the Petitioner's brief reads in part (R. 212, p. 23):

> "The Appellant submits that the purpose of the 1950 amendment phrase here in question is twofold. First, it is to secure to a public administrator who has been granted administration on an estate within the purview of the act the right to continue in the trust after the appointment and qualification of his successor. Second, it is to secure to a public administrator at the time

of the creation of an estate within the purview of the act a right to administer such estate prior to his successor if he applies for letters of administration thereon before his successor applies therefor."

Question II

Petitioner's claim of a violation of procedural due process which presents the issue designated *Question II* arising from the Rhode Island Supreme Court's refusal to consider and determine the merits of the Petitioner's appeal from the Rhode Island Superior Court judgment which, inter alia, found the Respondent Gordon Cairns to be next of kin of the decedent, is raised for the first time in these papers. The Rhode Island Supreme Court declined to entertain the Petitioner's petition for reargument. (R. 3). The petition for reargument contained the claim of a violation of procedural due process required by the Fourteenth Amendment which presents the issue designated *Question II.* (R. 10). The Petitioner's petition for reargument stated as one ground for reargument that (R. 10):

> "The decision of this Court filed on July 12, 1967, deprives the Appellant of procedural due process of law by refusing to consider and determine the merits of his appeal and denying and dismissing his appeal for original lack of standing before the probate court, contrary to U.S. Const. Amend. XIV, Sec. 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .' ".

Question III

Petitioner's claim, on behalf of the people of Providence, of a violation of procedural due process, which presents the issue designated *Question III*, arising from the Rhode Island Supreme Court's refusal to consider and determine the merits of the Petitioner's appeal from the Rhode Island Superior Court judgment which, inter alia, found Respondent Cairns to be next of kin of the decedent, is raised for the first time

in these papers. The Petitioner's claim, on behalf of the people of Providence, is fairly comprised within the ground for reargument contained in the Petitioner's petition for reargument to the Rhode Island Supreme Court (R. 10) which is referred to and quoted supra. As aforesaid, the Rhode Island Supreme Court declined to entertain the Petitioner's petition for reargument. (R. 3).

REASONS FOR GRANTING THE WRIT

I

The judgment should be reviewed because it presents a novel and important question of federal constitutional law comprised within *Question I*, to wit: *Is a Contract Right "Property" within the meaning of the Fourteenth Amendment of the Constitution of the United States?*

The basis of the Petitioner's claim of a property right to receive the grant of administration on the Beazley Estate is founded in a conract which, the Petitioner claims, was entered into between the Petitioner and the State of Rhode Island at the time of the creation of the Beazley Estate. The terms of the contract, the Petitioner claims, are set forth in the Public Administrator Act which had been enacted as a means to accomplish an object which the State wished to promote: the custody and care of intestate property of deceased persons, derelict from the absence of claimants, and its preservation from being wasted or intruded on by strangers, to the disinherison of the heirs, or to the loss to the legal representatives, when they might come to demand it. The object was deemed beneficial to the State. This benefit, the Petitioner claims, constituted the consideration to be given by the Petitioner and received by the State for the right granted the Petitioner to administer the Beazley Estate.

The decedent was a resident of Providence (R. 211, Ex. 11), and he died intestate (R. 223, p. 158), leaving no known widow or next of kin him surviving within the State

of Rhode Island (R. 223, p. 157). These are undisputed facts. Also undisputed are the facts that the decedent died during the Petitioner's term of service as Public Administrator (R. 223, p. 133) and that no other public administrator had been granted administration on the Beazley Estate or had instituted proceedings for administration thereon (R. 223, p. 126). On these simple facts the Petitioner bases his contractual claim of right to receive the grant of administration of the Beazley Estate, for these facts satisfy all the conditions precedent to the Petitioner's right to administer as set forth in Section 2 of the Public Administrator Act.

This Court has recognized the right of a state to contract with a private person for the exercise of a part of its sovereign powers by that private person. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518. However, this Court has not considered the question whether or not a contract right is such "property" as is protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Assuming that the Due Process Clause of the Fourteenth Amendment does protect contract rights, and that Section 2 of the Public Administrator Act grants the Petitioner a contract right to administer the Beazley Estate because the decedent was a resident of Providence, died intestate, left no known widow or next of kin in Rhode Island, and because no public administrator other than the Petitioner had sought or received letters of administration on the Beazley Estate, then the Rhode Island Supreme Court's interpretation of Section 2 of the Act, construing the 1950 Amendment to Section 2 to mean that the Petitioner must file for administration before anyone else files for administration, constitutes a deprivation of the Petitioner's property right to administer the Beazley Estate without due process of law.

This Court has recognized that a litigant may be deprived of rights protected by the Due Process Clause of the Fourteenth Amendment by state court action and that the de-

privation may be accomplished by a state court in the course of construing a state statute. See *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673. State court action, in the form of the judgment sought to be reviewed, which deprives the Petitioner of his property right to receive the grant of administration on the Beazley Estate, is what the Petitioner is complaining of in these papers. The non-federal ground upon which the judgment is founded, *i.e.*, the interpretation of Section 2 of the Public Administrator Act to denote administration proceedings instituted by non-public administrators as being "proceedings. . . pending" is so interwoven with the federal question of whether or not the Act granted the Petitioner a contract right to administer the Beazley Estate, which contract right is the Petitioner's "property", as not to be an independent state matter of statutory construction.

Where, as here, the Rhode Island Supreme Court's interpretation of the 1950 Amendment to Section 2 of the Public Administrator Act is so interwoven with the federal question presented (*Question I*) this Court has recognized its jurisdiction "is plain". *Enterprise Irrig. Distr. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164.

II

The judgment should be reviewed because it is plain error for the Rhode Island Supreme Court to refuse to review the Petitioner's contentions that the Superior Court erred in finding the Respondent Cairns to be next of kin of the decedent. The Supreme Court's error is plain in fact because the *sine qua non* of the rationale of the judgment sought to be reviewed is that the Respondent Cairns is next of kin of the decedent. The error is plain in law. — A state statute provides that an appeal should be heard and determined by the Rhode Island Supreme Court. 2 R.I. Gen. L. (1956) 9-24-11. The due process clause of the Fourteenth Amendment to the Constitution of the United States requires a court to hear and determine the matters which are properly brought before it. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

Although the apparent rationale of the judgment is that the Petitioner lacked standing before the probate court because of the pendency of another person's (Respondent Cairns') petition for administration at the time of the Petitioner's appearance therein, without regard to whether that person had an interest in the Beazley Estate or was a stranger, a close analysis of the opinion delivered on the rendering of the judgment sought to be reviewed shows that the real rationale of the opinion is that the Petitioner lacked standing before the probate court at the time of his appearance therein because of the pendency of the petition for administration of a person (Respondent Cairns) whose status was that of next of kin of the decedent.

Although the Petitioner's claim (presented by *Question II*) that the Rhode Island Supreme Court's refusal to review the merits of his appeal violated procedural due process is raised for the first time in these papers, it is because that claim and the issue it presents were born in the surprise judgment sought to be reviewed. In his petition for reargument the Petitioner presented the issue re-articulated in these papers as *Question II.* (R. 10). The Rhode Island Supreme Court declined to entertain the Petitioner's timely petition for reargument. (R. 3). Therefore, the claim could be raised in no other way than by these papers. This Court has held that a federal question raised for the first time in papers addressed to this Court is raised at the proper time if the question is born in the judgment of the highest court in which a judgment could be had and a timely petition for reargument therein is declined. See *Saunders v. Shaw*, 244 U.S. 317, 320. See also *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

III

The judgment should be reviewed because it substantially deprives the people of Providence of the services of the Public Administrator in this case and in future cases. The judgment nullifies the legislative purpose of the Public Administrator Act, *i.e.*, the protection of estates within the pur-

view of the Act from intrusion thereon by strangers, and accomplishes the nullification by depriving the Public Administrator of the right to contest for letters of administration against a person who alleges a justiciable interest in an estate if such person has filed a petition for administration in the probate court before the Public Administrator files his petition for administration. The judgment reaches the result of requiring a public administrator to be omnicient, for in order to file the first petition for administration on an estate within the purview of the Act a public administrator must know that such an estate has been created and that some other person is about to institute administration proceedings thereon, although a public administrator may never receive legal or actual notice of the fact that such an estate has been created or that some other person is about to institute administration proceedings thereon.

IV

The judgment should be reviewed because the people of Providence have an economic interest (*i.e.*, the use, without the payment of interest, of the Beazley Estate assets in the absence of distributees) in obtaining Rhode Island Supreme Court review of the Rhode Island Superior Court finding that Respondent Cairns is next of kin of the decedent. The Petitioner is the appropriate representative of the people of Providence to seek review of the Rhode Island Superior Court finding because it is the Petitioner's duty to pay over the balance of any estate he has fully administered to the City Treasurer who must hold it for the use of the City of Providence. Public Administrator Act, Secs. 8, 10.[2] The economic right of the people of Providence who

[2] Despite the repeal of R. I. Gen. Stat., 1872, Ch. 177, Sec. 6 (now 6 R. I. Gen. L. (1956) 33-21-8) by P. L. 1961, Ch. 195, Sec. 2, whereby the State took from the City of Providence the beneficial use of the personal estates of resident decedents dying intestate without known spouses or next of kin, it remains in force respecting the use of estates (such as the Beazley Estate) which came into existence prior to the approval of P. L. 1961, Ch. 195 on June 10, 1961. See *Attorney General v. City of Providence*, 8 R. I. 8 (1862).

are not individually before the Court cannot be effectively vindicated except through the Petitioner. This Court has exercised its jurisdiction over cases "where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court," as when the N.A.A.C.P. was acting on behalf of its members. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459-460. And in *Baker v. Carr*, 369 U.S. 186, 204-208, this Court held that individual voters have standing to raise the issues, in order to vindicate "an interest of their own, and of those similarly situated".

V

The judgment should be reviewed because the question of whether or not a public administrator acquires a Fourteenth Amendment "property" right to receive the grant of administration on an estate within the purview of the Public Administrator Act at the time of the creation of such an estate is a question which is involved in several cases now pending before the courts of Rhode Island. The majority of cases involve estates originally administered by the Petitioner's predecessor, Bernard J. Gallagher who died on September 14, 1962. Since the city council elected Leonard A. Kiernan to be Public Administrator on January 7, 1963, and elected Francis J. Maguire to be Public Administrator on January 4, 1965, and re-elected Francis J. Maguire to be Public Administrator on January 2, 1967, the pending cases involve actual and potential three-party contests for the grants of administration de bonis non. (The Public Administrator Act, Section 11 provides that a public administrator shall succeed his deceased predecessor as administrator de bonis non.) Therefore, an early and definitive ruling is desirable on the issue of whether or not a public administrator is vested with a "property" right in the grant of administration on an estate created during his term of service. The question will lurk in the labyrinth of future cases every time the Providence City Council elects a new public administrator, for human nature being what it is

and the emoluments for a public administrator's services being only the fees awarded out of the assets of those estates committed to his care (R. 223, p. 159), it is likely that each newly elected public administrator will seek to replace his predecessor as administrator of estates within the purview of the Act. This suggestion is not an imaginary hypothetical situation. It constitutes the facts of Case No. 44A on the current argument list of the Rhode Island Supreme Court, styled *Martin Malinou, Public Administrator v. Leonard A. Kiernan, Public Administrator.* The Intervenor in that case, Francis J. Maguire, who is claiming title to the office of Public Administrator, is claiming the exclusive right to administer the estate of the late Carrie Cumber which is the subject of that case. In that case the instant Petitioner claims a property right in the grant of administration de bonis non on the theory that the right to administer was transferred to him under Public Administrator Act, Section 11 on the death of his predecessor who had received the original grant of administration and who died during the Petitioner's term of service.

VI

The judgment should be reviewed because, while the Rhode Island Supreme Court avows that it is construing the Public Administrator Act, that court has arrogated to itself the political[3] function of deciding that the Public Administrator should not be permitted to be an "intermeddler" (R. 22; Appx. A, p. 4) in probate administration proceedings instituted by alleged[4] kin of an intestate. The tone of the

[3] At the time of the introduction and passage of the 1950 Amendment to Section 2 of the Public Administrator Act the Petitioner's predecessor in the office of Public Administrator, the late Bernard J. Gallagher, was not only the Public Administrator but he was also a member of the Rhode Island House of Representatives. The amendatory legislation originated in the Rhode Island House of Representatives. H-910, Jan. Sess. (1950).

[4] At the probate court hearing the Respondents did not offer evidence to support the Respondent Cairns' claim to heirship (R. 218,

opinion delivered upon the rendering of the judgment sought to be reviewed bespeaks an arrogation of a political role. With the same pertinent facts (*i.e.*, that the Petitioner appeared in the probate court after the Respondent Cairns had filed his administration petition) before it a differently constituted Rhode Island Supreme Court in 1962 recognized the Petitioner's right to contest the claim to heirship of the respondent Cairns, and recognized the petitioner's right to receive a review of the merits of his appeal from the judgment of the Rhode Island Superior Court. The Rhode Island Supreme Court in 1962 declared (R. 156):

> "We do not deem the circumstances in the case at bar as disclosed by the return to be so exceptional as to require immediate review. And it is otherwise clear therefrom that the superior court acted within its jurisdiction in passing upon the respondents' motion for the dedimus in question. Whether it erred in allowing the dedimus to issue ex parte is quite another question. However, if after the final determination of his claim of appeal the petitioner is aggrieved by the superior court's refusal to sustain the grounds of his motion to quash and grant the same he may then have such action reviewed by a bill of exceptions." Condon, C. J. in *Malinou v. Cairns*, 94 R. I. 279, 281.

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pp. 10-11) other than to offer the petition (R. 200) in which the Respondent Cairns alleged that he was a "remote cousin" of the decedent. The Respondent Cairns never did testify or attend the hearing in the probate court (R. 218, pp. 10-11) nor did he testify or attend the trial in the superior court (R. 224, p. 33). An inspection of the record will show that the only demeanor testimony offered by the Respondents at the superior court trial was the testimony of a geneologist who the trial court allowed to give opinion testimony to the effect that the Respondent Cairns was the decedent's "next of kin" and "second cousin once removed". (R. 223, p. 18).

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Dated: October, 1967